

JUN 8 1976

MICHAEL RODAK, JR., CLERK

No. 75-1568

In the Supreme Court of the United States
OCTOBER TERM, 1975

**J. FRANK KELLY, INCORPORATED, AND HARTFORD
ACCIDENT & INDEMNITY COMPANY, PETITIONERS**

v.

**CHARLES SWINTON AND JACK GARRELL,
DEPUTY COMMISSIONER, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
DEPARTMENT OF LABOR**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

**ROBERT H. BORK,
Solicitor General,
Department of Justice,
*Washington, D.C. 20530.***

**WILLIAM J. KILBERG,
*Solicitor of Labor,***

**LAURIE M. STREETER,
*Associate Solicitor,***

**JOSHUA T. GILLELAN, II,
Attorney,
Department of Labor,
*Washington, D.C. 20210.***

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1568

**J. FRANK KELLY, INCORPORATED, AND HARTFORD
ACCIDENT & INDEMNITY COMPANY, PETITIONERS**

v.

**CHARLES SWINTON AND JACK GARRELL,
DEPUTY COMMISSIONER, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
DEPARTMENT OF LABOR**

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is not yet reported. The order of the district court (Pet. App. 23a) is not reported. The findings and award of Deputy Commissioner Garrell (Pet. App. 24a-27a) are not reported.

JURISDICTION

The district court's jurisdiction rested on Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1436, as amended, 33 U.S.C. 921(b). The court of appeals concluded that the district court's jurisdiction had not been affected by the amendment to Section 21 that took effect while the case was pending before the

district court (Pet. App. 5a-11a).¹ This conclusion is not challenged by petitioners.

The judgment of the court of appeals was entered on February 3, 1976,² and the petition for a writ of certiorari was filed on April 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act creates a presumption that there is a causal relationship between a compensation claimant's employment and his disabling condition.

2. Whether the court of appeals erred in holding that, on the facts of this case, petitioners had failed to overcome that presumption.

STATUTE INVOLVED

Section 20 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1436, 33 U.S.C. 920, provides in relevant part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be pre-

¹Section 15(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1261-1262, 33 U.S.C. (Supp. IV) 921(b) and (c), amended Section 21(b) by creating a new appellate tribunal (the Benefits Review Board) within the Department of Labor to replace the several United States district courts as the initial reviewing authority with respect to orders issued under the Act and its extensions. The decisions of the Benefits Review Board are reviewable directly by the courts of appeals.

²On February 18, 1976, respondent Garrell filed a "motion for Clarification of Action to Be Taken on Remand," seeking resolution of the question whether on remand he retained the authority to render a decision on the original record, notwithstanding the intervening amendment to the hearing procedures under the Longshoremen's Act (Section 14, 86 Stat. 1261, 33 U.S.C. (Supp. IV) 919(d)). On February 25, 1976, the court of appeals stayed its mandate pending resolution of the motion, which has not yet been acted upon.

sumed, in the absence of substantial evidence to the contrary-

(a) That the claim comes within the provisions of this Act.

* * * * *

STATEMENT

Respondent Charles Swinton filed a claim for workers' compensation disability benefits against petitioners, his employer and the employer's compensation insurance carrier, under the Longshoremen's and Harbor Workers' Compensation Act, as in effect at the time, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act of May 17, 1928, 45 Stat. 600, 36 D.C. Code 501-502 (1973 ed.). He alleged that he has been totally disabled since March 7, 1970, because of a back condition caused by a fall from a truck, in the course of his employment, on May 12, 1969 (Pet. App. 24a-26a).

Petitioners did not dispute the occurrence of the fall or the fact that it had caused multiple injuries. Petitioners paid Swinton compensation for the six weeks of total disability which immediately followed the fall (Pet. App. 26a). Petitioners did not introduce any evidence to show that Swinton's present back condition was not totally disabling. They argued only that there was no causal relationship between the fall and the back condition.

The evidence presented in support of this position, viewed most favorably to petitioners (and set out at Pet. 32-33), showed that, although Swinton had had spasms of the paravertebral muscles in his lumbosacral region upon his initial medical examination the day after the fall, he had not continued to complain of back pain thereafter, had received no medical attention for his back, and

had performed the duties of his strenuous employment on a more-than-full-time basis from early July 1969 until the following February 4; on the latter date he returned to his physician complaining of increasing lower-back pain, which forced him to stop working a month later (Pet. App. 3a, 25a-26a).

On June 20, 1972, Deputy Commissioner Garrell issued a compensation order finding that the "back pain which first became manifest in February, 1970, and any back condition attributed thereto were not caused, aggravated, accelerated or adversely affected by the injury on May 12, 1969" (Pet. App. 26a). Deputy Commissioner Garrell therefore rejected respondent Swinton's claim (*id.* at 27a).

The district court held, in effect, that this decision was supported by substantial evidence (Pet. App. 23a). The court of appeals disagreed, holding that the compensation decision was not supported by substantial evidence that the fall and the back condition were causally unrelated. In the absence of such evidence, the court held, the statutory presumption of Section 20(a) controlled. The court consequently set aside the deputy commissioner's rejection of the claim.

ARGUMENT

Although a few hoary decisions of other courts of appeals, and a few more recent *dicta*, appear to support petitioner's argument, there is no substantial conflict between the court of appeals' decision and the currently prevailing views of other circuits. To the extent there is a difference of opinion among the circuits concerning the effect of the Section 20(a) presumption, this difference may well dissipate in light of the new review procedures created by Congress in 1972. Because the new review procedures may enable the courts of appeals to reconcile

their views without the need for review by this Court, we believe that the petition should be denied.

I. Petitioners' allegation that the Section 20(a) presumption is *only* a "jurisdictional presumption" (Pet. 14) was not presented to the court of appeals and therefore is not properly before this Court.³ It is wrong in any event.

As petitioners acknowledge (Pet. 14), this Court has used the Section 20(a) presumption as an aid in the determination of whether an injury satisfied the Act's general requirement for compensability—that it "aris[e] out of and in the course of employment" (33 U.S.C. 902(2)). *O'Keeffe v. Smith Associates*, 380 U.S. 359. The disputed causal-connection issue in this case is but one aspect of that statutory requirement, and therefore is entirely indistinguishable from the issue in *Smith Associates*.

The courts of appeals agree that Section 20(a) creates a presumption applicable to the causal-connection question. See, e.g., *John W. McGrath Corp. v. Hughes*, 264 F.2d 314, 317 (C.A. 2); *Marra Bros. v. Cardillo*, 154 F.2d 357 (C.A. 3); *Strachan Shipping Co. v. Shea*, 406 F.2d 521, 522 (C.A. 5), certiorari denied, 395 U.S. 921; *Continental Insurance Co. v. Byrne*, 471 F.2d 257, 260-261 (C.A. 7), certiorari denied, 406 U.S. 918; *Pillsbury v. Liberty Mutual Insurance Co.*, 143 F.2d 807, 809 (C.A. 9). The question over which debate has occurred concerns the effect of

³*United States v. Ortiz*, 422 U.S. 891, 898; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2.

the presumption, not its existence.⁴ Cf. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 205.⁵

2. The evidence upon which petitioners rely (Pet. 32-33) as the substantial evidence necessary to support denial of Swinton's claim is, as the court of appeals observed (Pet. App. 15a), entirely non-medical and circumstantial. It could support an inference that there was no causal connection between Swinton's fall and the back condition only if it were combined with evidence that, had there been such a connection, the condition would have had serious consequences sooner. Petitioners introduced no

⁴The Seventh Circuit earlier had stated that "[t]he fact as to the causal connection between the employment and the injury is not one which is to be * * * presumed [under Section 20(a)]." *Eschbach v. Contractors, Pacific Naval Air Bases*, 181 F.2d 860, 864. This statement has been cited by a number of other courts, but they do not take this language literally. They adopt the District of Columbia Circuit's longstanding rule that doubts, including factual doubts, are to be resolved in favor of the injured employee, thus effectively using the presumption. See, e.g., *Young & Co. v. Shea*, 397 F.2d 185, 188, rehearing denied, 404 F.2d 1059 (C.A. 5), certiorari denied, 395 U.S. 920. *Eschbach* has been abandoned by the Seventh Circuit itself, which has at least twice invoked the presumption on the causal-connection question, citing the District of Columbia Circuit's cases and this Court's opinion in *Smith Associates, supra*, while omitting even to mention *Eschbach*. *American National Red Cross v. Hagen*, 327 F.2d 559; *Continental Insurance Co. v. Byrne, supra*.

⁵Any limitation of the presumption's effect to questions of "jurisdiction" would be inconsistent with the interpretation New York has given to the statute (Section 21(1) of the New York Workmen's Compensation Law (McKinney 1965)) from which Section 20 was adopted verbatim. See, e.g., *Driscoll v. Gillen & Sons Lighterage, Inc.*, 187 App. Div. 908, 173 N.Y.S. 825, affirmed, 226 N.Y. 568, 123 N.E. 863; *Smith v. A. M. Oesterheld & Son*, 189 App. Div. 384, 179 N.Y.S. 10, affirmed, 229 N.Y. 525, 129 N.E. 901; *Ciriello v. Great Lakes Dr. & D. Co.*, 231 N.Y. 556, 132 N.E. 886; *Norris v. New York Central R.R.*, 246 N.Y. 307, 158 N.E. 879; *Daly v. Opportunities for Broome, Inc.*, 48 App. Div. 2d 99, 367 N.Y.S. 2d 851.

medical testimony that the condition was not the result of the fall. And the proposition is contrary to common experience, which is that many back injuries that at first appear insignificant often turn out months later to be serious.⁶ The undisputed principle that doubts are to be resolved in favor of employees in order to cast the burden of possible error on those best able to bear it⁷ provides further support for the court of appeals' rejection of petitioners' argument.⁸

3. Prior to 1972 cases under the Act were adjudicated by the deputy commissioners for the fifteen "compensation districts."⁹ Actions for review of their decisions were

⁶The court of appeals referred to its experience with such "medical case histories" (Pet. App. 17a, n. 48; see also *id.* at 18a-19a and n. 52). Numerous recent examples of such latent back injury cases are contained in 3 Larson, *The Law of Workmen's Compensation* §§ 78.41-78.42, nn. 23-25, 28, 30, 34, 39.1, 41, 65 (1976).

⁷Pet. App. 19a-21a and nn. 56-64. Cf. *F. H. McGraw & Co. v. Lowe*, 145 F.2d 886 (C.A. 2); *Young & Co. v. Shea, supra*.

⁸Since it found the evidence upon which petitioners rely to have been insubstantial, the court of appeals' decision is not inconsistent with *Del Vecchio v. Bowers*, 296 U.S. 280. What is more, *Del Vecchio* has been eroded not only by intervening developments in the theory of presumptions but also by subsequent decisions of this Court. See the discussion in *Breeden v. Weinberger*, 493 F.2d 1002, 1006-1007 and n. 8 (C.A. 4).

Petitioners have not challenged the constitutionality of the Section 20(a) presumption. There is consequently no reason to hold this case pending the decision in *Usery v. Turner Elkhorn Mining Co.*, No. 74-1302, and *Turner Elkhorn Mining Co. v. Usery*, No. 74-1316, both argued December 2, 1975, which involve constitutional challenges to certain compensation presumptions.

⁹20 C.F.R. 31.2, 41.1(a) (1971); 20 C.F.R. 702.101, 704.201.

brought in the many federal district courts within whose geographical boundaries injuries covered by the Act occurred.¹⁰ and the deputy commissioners were represented in such proceedings by the United States Attorneys for those districts.¹¹ Only after this disparate treatment did cases reach the courts of appeals.

Now, however, the administrative law judges who adjudicate contested cases under the Act¹² are subject to review by a single tribunal of nationwide jurisdiction, the Benefits Review Board. Decisions of the Benefits Review Board are reviewed directly by the courts of appeals, and the Department of Labor's administrative policies under the Act are presented at all levels of adjudication by a single legal staff, that of the Solicitor of Labor.¹³ Petitioners' complaint (Pet. 25) that there is a "lack of uniformity as to the proper function of the presumption [of] § 20(a)" in the decisions of administrative law judges will be rectified by the Benefits Review Board. The Board's decisions are themselves uniform (as petitioners concede, Pet. 23-25) and consistent with the decision of the court of appeals in this case.

It is true that different courts of appeals rendered apparently conflicting decisions concerning the effect of the Section 20(a) presumption when faced with divergent administrative positions under the pre-1972 adjudication

¹⁰Section 21(b), 44 Stat. 1436, 33 U.S.C. 921(b).

¹¹45 Stat. 490, 33 U.S.C. 921a.

¹²Section 14, 86 Stat. 1261, 33 U.S.C. (Supp. IV) 919(d).

¹³Section 16, 86 Stat. 1262, 33 U.S.C. (Supp. IV) 921a.

and review procedures.¹⁴ But the new procedures may well facilitate a resolution of these differences without the need for intervention by this Court. No court of appeals has set aside a decision of the Benefits Review Board resting on its view of the causal-connection effect of the Section 20(a) presumption. In these circumstances, there is no occasion to grant the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

LAURIE M. STREETER,
Associate Solicitor,

JOSHUA T. GILLELAN, II,
Attorney,
Department of Labor.

JUNE 1976.

¹⁴Some courts, like the court below, have used the presumption as if it must be "rebutted" by substantial evidence. Others, relied upon by petitioner, have stated that the presumption has no effect once any evidence is introduced. And still others appear to have indicated that the presumption standing alone cannot discharge the claimant's burden even if no conflicting evidence is introduced. See note 4, *supra*.